



## DEPARTMENT OF JUSTICE

### 28 CFR Part 81

[Docket No. CRM 120; AG Order No. 5665-2023]

RIN 1105-AB57

### Implementing the Child Pornography Victims Reserve

**AGENCY:** Department of Justice.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** By this rule, the Department of Justice (“the Department”) is proposing regulations that implement the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018 (“the AVAA Act” or “the Act”). The Act established the Child Pornography Victims Reserve (“Reserve”) to provide defined monetary assistance to eligible individuals who are depicted in child pornography that is the basis for certain convictions. The Reserve provides payment to such child pornography victims based on orders obtained in United States district courts. By statute, eligibility determinations are made by courts. Under this proposed rule, a claimant may choose to request that the Department present an application for a court order. This proposed rule provides procedures for the submission of requests and court orders to the Department related to payments from the Reserve. The Department will provide payment from the Reserve to the victim pursuant to a court order issued, upon receipt of the order and the requisite information from the claimant following instructions on the Department’s website for this program.

**DATES:** Written and electronic comments must be sent or submitted on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments received by mail will be considered timely if they are postmarked or otherwise indicate a mailing or shipping date on or before the last day of the comment period. The

electronic Federal Docket Management System will accept electronic comments prior to Midnight Eastern Time at the end of that day.

**ADDRESSES:** If you wish to provide comments regarding this rulemaking, you must submit those comments, identified by the agency name, and reference Docket No. CRM 120, by one of the two methods below.

- Federal Rulemaking Portal (preferred): <https://www.regulations.gov>. Follow the website instructions for submitting comments.
- Mail: Paper comments that duplicate an electronic submission are unnecessary.

If you wish to submit a paper comment in lieu of electronic submission, please direct the mail or shipment to the following:

Mr. Steve Grocki  
Child Exploitation and Obscenity Section  
U.S. Department of Justice  
1301 New York Ave NW, Suite 1100  
Washington, DC 20530

To ensure proper handling, please reference the agency name and Docket No. CRM 120 on your correspondence. Mailed items must be postmarked or otherwise indicate a shipping date on or before the submission deadline.

**FOR FURTHER INFORMATION CONTACT:** Catherine Pierce, Senior Advisor, Office for Victims of Crime, telephone (202) 307-6785 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule via one of the methods and by the deadline stated above. All comments must be submitted in English or be accompanied by an English translation. The Department of Justice also invites comments that relate to the economic, environmental, or federalism effects that might result from this rulemaking. In addition, the Department seeks comments on appropriate criteria to be included in the request

form to the Department to ensure that claimants or their authorized representatives are who they purport to be and are not fraudulent. Comments that will provide the most assistance to the Department in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Please note that all comments received are considered part of the public record and made available for public inspection at [www.regulations.gov](http://www.regulations.gov). Interested persons are not required to submit their personally identifying information (“PII”) in order to comment on this proposed rule. However, any PII that is submitted is subject to being posted to the publicly accessible website at [www.regulations.gov](http://www.regulations.gov) without redaction.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online.

Additionally, the Department may withhold from public viewing information provided in comments that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of <https://www.regulations.gov>. To inspect the agency’s public docket file in person, you must make an appointment with the agency. Please see the **FOR FURTHER INFORMATION CONTACT** paragraph above for agency contact information.

## **II. Overview**

The Child Pornography Victims Reserve was established to provide defined monetary assistance to eligible individuals who are depicted in child pornography that is the basis for certain convictions under 18 U.S.C. chapter 110. The Amy, Vicky, and Andy Child

Pornography Victim Assistance Act of 2018, Pub. L. 115-299, secs. 4–5, 132 Stat 4383, 4385–88, codified at 18 U.S.C. 2259, 2259A, and 2259B, and 34 U.S.C. 20101(d). Under 18 U.S.C. 2259(d), a United States district court may order payment from the Reserve to a victim of a defendant convicted in Federal court of trafficking in child pornography depicting that victim. The Department, pursuant to this proposed rule, will make a payment from the Reserve to such child pornography victims based on orders obtained in United States district courts.

The Department is issuing this proposed rule pursuant to 18 U.S.C. 2259B(c), which provides that the Attorney General shall issue regulations to implement the payment of defined monetary assistance out of the Reserve. This proposed rule outlines procedures for persons to request to apply through the Department for the defined monetary assistance. As set forth in more detail below, if a claimant chooses to proceed through the Department, the Department may present the claimant’s application for a court order. (“Claimant” means the person who claims to be a victim of trafficking in child pornography and to be eligible for the defined monetary assistance at 18 U.S.C. 2259(d), and “victim” or “victim of trafficking in child pornography” means a person whom a Federal court has determined, under 18 U.S.C. 2259(d)(1)(B), to be a victim of trafficking in child pornography.) The Department will provide payment from the Reserve to the victim pursuant to a court order issued under 18 U.S.C. 2259(d)(1)(C), upon receipt of the order and the requisite information from the claimant following instructions on the Department’s website for this program.

The proposed rule also sets forth procedures by which persons may submit requests to the Department through their attorney, a legal guardian (in the case of claimants under the age of 18 or who are incompetent, incapacitated, or deceased), or a representative authorized by the claimant, which includes a personal representative of an estate (for deceased claimants) (collectively, “authorized representative”). The proposed rule is procedural in nature, implementing a process by which a claimant may request that the Department facilitate the claimant’s request that a court make a determination of eligibility pursuant to the eligibility

requirements in the Act. It does not create new rights or impose obligations independent of the statute, and it does not create an attorney-client relationship between the claimant and any Department attorney.

### **III. Background**

Under Federal law, victims of child pornography offenses are entitled to full and timely restitution from defendants charged and convicted in Federal court, including restitution for losses caused by conduct such as the possession, receipt, viewing, transportation, and distribution of these images. *See* 18 U.S.C. 2259. Restitution is imposed upon an individual criminal defendant by a Federal court at the time of sentencing, and the obligation to pay restitution is part of the defendant's criminal sentence. *See id.*; *see also* 18 U.S.C. 3663A. The Federal Government bears the burden of proving that the defendant owes restitution to a victim, although a defendant can agree to pay restitution as part of a plea agreement. In order for a court to impose a restitution obligation on a child pornography trafficking defendant, the Federal Government, represented by the prosecutor, must prove the following:

- Victim status: This element means that the person seeking restitution is a victim, i.e., that the person has been harmed as a result of the commission of a Federal child pornography trafficking crime.
- Losses: This element refers to the amount of losses incurred by the victim, both since the offense took place and that are reasonably projected to be incurred in the future. There is no statutory limit on how much restitution may be ordered to be paid to a victim, but there must be a sufficient evidentiary basis to prove that all of the losses have been or are reasonably projected to be incurred. The statute permits recovery for the following types of losses: medical services relating to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; reasonable attorneys' fees, as well as other costs incurred; and any other relevant losses incurred

by the victim. 18 U.S.C. 2259(c)(2). Restitution losses are limited to actual monetary losses and should not be confused with amounts of money a victim might be awarded for pain and suffering or punitive damages in a civil tort lawsuit.

- Causation: As discussed in more detail below, this element requires proof that the losses were caused in the aggregate by the trade in child pornography depicting the victim.
- Amount: In cases where multiple defendants contributed to the victim's losses, the court must determine how much each individual defendant should pay to the victim.

In all Federal cases, restitution is obtained on a case-by-case basis. Because child pornography can be possessed and shared by many different unrelated criminal defendants and distributed repeatedly, a single child pornography trafficking victim may receive restitution orders in hundreds of individual criminal cases being brought in different Federal courts all over the country. Under current law, each of these defendants is ordered to pay some portion of the victim's overall losses. Once the victim has collected payment for the full amount of the victim's losses from one or more defendants, no further restitution orders can be imposed on additional defendants on the victim's behalf unless new losses are incurred. *See* 18 U.S.C. 2259(b)(2)(C).

In 2009, a victim sought restitution for the first time, not from the individual who sexually abused her and produced and shared the images, but from individuals who subsequently traded and collected those images. A small number of other child pornography victims subsequently sought similar restitution. Federal prosecutors across the country were soon seeking restitution for victims in Federal courts in child pornography possession, receipt, and distribution cases.

Despite the Department's overall success in obtaining orders of restitution for these victims, courts were inconsistent in their approach to restitution claims. Some courts struggled to determine whether an individual defendant convicted of possession, receipt, or distribution

proximately caused a victim's losses. If a defendant was only one of thousands who harmed the victim, then some courts indicated that the defendant could not be said to have caused the victim's losses because those losses would be essentially the same if that particular defendant had never committed the crime. On that logic, some courts simply denied the restitution requests. Others demanded a showing as to how much an individual defendant's crime incrementally increased the victim's losses, imposing a generally insurmountable evidentiary burden. Among courts that awarded restitution, many grappled with how to determine the amount that the defendant should pay to the victim.

These issues were brought to the Supreme Court in *Paroline v. United States*, 572 U.S. 434 (2014). After finding that section 2259 required proof of proximate causation for all the categories of losses referenced in the statute, the Court summed up the problem this way:

In this case . . . , a showing of but-for causation cannot be made. . . . From the victim's perspective, Paroline was just one of thousands of anonymous possessors. . . . [I]t is not possible to prove that her losses would be less (and by how much) but for one possessor's individual role in the large, loosely connected network through which her images circulate. Even without Paroline's offense, thousands would have viewed and would in the future view the victim's images, so it cannot be shown that her trauma and attendant losses would have been any different but for Paroline's offense.

*Id.* at 450 (internal citations omitted).

To resolve this dilemma, the Court adopted the less demanding aggregate causation standard:

[A]lternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes. It would be anomalous to turn away a person harmed by the combined acts of many wrongdoers simply because none of those wrongdoers alone caused the harm. And it would be nonsensical to adopt a rule whereby individuals hurt by the combined wrongful acts of many (and thus in many instances hurt more badly than otherwise) would have no redress, whereas individuals hurt by the acts of one person alone would have a remedy.

*Id.* at 452. Therefore, the Court concluded:

In this special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses.

*Id.* at 458. The Court then considered how district courts might determine the amount a given defendant should pay a victim in restitution. To provide guidance, the Court cited a number of factors courts might consider, including “the number of past criminal defendants found to have contributed to the victim’s general losses; . . . whether the defendant reproduced or distributed images of the victim; whether the defendant had any connection to the initial production of the images; how many images of the victim the defendant possessed; and other facts relevant to the defendant’s relative causal role.” *Id.* at 460.

The Department is not aware of any district court judge since *Paroline* denying a restitution request in a child pornography possession, receipt, or distribution case for insufficient proof of causation. The aggregate causation standard is easily understood and applied. To the extent that restitution is contested, the dispute is often solely over how much a defendant should be ordered to pay a given victim.

Nonetheless, even after *Paroline*, few victims exercised their right to restitution. It appeared that the process of tracking hundreds of cases around the country over the course of years was too burdensome. Almost all victims seeking restitution in child pornography trafficking cases hire an attorney to help coordinate the logistics. In addition, although the government bears the burden of proving restitution, in order to submit estimates of future losses, many victims hire psychological experts and economic analysts to help prepare their claims. The necessity of engaging multiple experts has served as a barrier that prevents victims from seeking restitution at all.

Congress therefore enacted the AVAA Act to create an alternative system to allow victims of trafficking in child pornography to obtain some measure of compensation (called “defined monetary assistance”) without having to prove their losses. The process of obtaining defined monetary assistance is an alternative to the traditional means of seeking restitution as part of a Federal prosecution. Providing the defined monetary assistance alternative is meant to ameliorate the structural impediments that prevent victims from claiming restitution while



preserving the option of obtaining full restitution for those who wish to do so. Under the terms of the statute, victims of these types of child pornography offenses can choose whether to present their full restitution claims in court through prosecutors, as is currently done, or to obtain a one-time payment of defined monetary assistance. The amount of defined monetary assistance in 2019 was \$35,000, but the amount is adjusted for inflation over time. 18 U.S.C. 2259(d)(1)(D).

The Act provides that the “Attorney General shall administer” the Reserve. *See* 18 U.S.C. 2259B(c). The determination regarding victim eligibility for the payment is made by the court. The procedural details of the Department’s administration of the Reserve and the substantive law applicable to the court’s determination are discussed in Section IV of this preamble.

#### **IV. Proposed Process to Obtain Defined Monetary Assistance from the Reserve**

Pursuant to 18 U.S.C. 2259(d)(1)(B) and (C), a district court determines whether a claimant is eligible to receive defined monetary assistance, and, if it makes such a finding, orders payment of defined monetary assistance to the victim or the victim’s authorized representative. The Act does not specify any application process, but it does authorize the Attorney General to administer the Reserve. Pursuant to this authorization, the Department proposes to establish the process set forth in this proposed rule to allow claimants to request that the Department facilitate obtainment of the requisite district court order for the victim.

##### *A. Proposed Request and Review Process*

This proposed rule is designed to assist claimants in obtaining court determinations of eligibility for payment of defined monetary assistance from the Reserve. Under the proposed rule, claimants may choose to request that the Department present an application to a court for the court’s determination of eligibility. The Department will review the request and may follow up as needed to seek additional information from the claimant or the claimant’s authorized representative in order to resolve any gaps in the claimant’s supporting information. It is the claimant’s responsibility to present evidence sufficient to establish a complete request, but in no

instance will the claimant be required to send—nor shall the claimant send—any images of child pornography. A request is complete where it is supported by all information required by the request form and by responses to follow-up requests for information. The Department will not present an application based on a request that is incomplete or duplicative of a request that the Department has already received. The Department will provide notice to a claimant if it decides not to present the requested application to the court.

After the Department receives a claimant's request, and the Department has exhausted reasonable efforts to obtain any needed additional information from the claimant, the Department will use reasonable efforts to identify a Federal child pornography trafficking case in which an image of the claimant appears. The Department will consider any case(s) identified by the claimant as well as any in which the Department has independent information linking the claimant to a Federal child pornography trafficking case. If, based on the information in the request, the claimant might be eligible for defined monetary assistance as a result of more than one case, the Department, in its sole discretion, will decide in which case it will present the application.

It may take time for the Department to identify an appropriate case to seek the required court order or to determine which of several potential cases is the most appropriate. The Department will endeavor to obtain the order in a timely manner.

*B. Presentment of an Application for an Order Affirming Eligibility*

Once the Department identifies an appropriate case, the Department will present the claimant's application to the district court, which may then issue an order affirming the claimant's eligibility for payment. The mere presentment of an application to a court does not imply that the Department has taken a position on the ultimate merits of the application. The Department may or may not (as it deems appropriate) present the application with an accompanying recommendation—for example, the Department may include a recommendation that the court grant the motion where the Department is persuaded that the statutory standard for

payment is met. Conversely, the Department may recommend that the court deny the application if it is not persuaded that the statutory standard for payment is met.

In the event that an application is denied by the district court, the Department may decide to appeal a ruling by a district court denying the claimant's eligibility for defined monetary assistance. The Department will make reasonable efforts to consult with the claimant (and the claimant's authorized representative, if applicable), on the issue of appeal.

Depending on the basis for the court's ruling, the Department may seek to present the claim underlying a denied application in another case when it would be appropriate to do so. The Department will make reasonable efforts to consult with the claimant (or the claimant's authorized representative, if applicable) about any decision to present a claim in another case.

If an application is denied by the district court, no appeal is taken or such appeal is unsuccessful, and the claim underlying an application is not presented in another case, the claimant will not receive defined monetary assistance on the basis of the claimant's request to the Department. If the claimant resubmits a request to the Department with additional supporting information, the Department may present that new application as consistent with these regulations.

### *C. Payment*

Once the court issues an order of payment, the Department will pay the victim the defined monetary assistance from the Reserve, as specified in the order. Payment will typically be made via electronic funds transfer facilitated by the Department of the Treasury, but the Department may use other methods (e.g., physical check) depending on the circumstances and technology or systems in place at the time of payment. Any money received may be subject to Federal, state, or local taxes.

### *D. Limits on Attorney Representative Fees and Costs*

There is no fee to submit a request to the Department when seeking defined monetary assistance from the Reserve, and a claimant (or authorized representative, if applicable) may

submit a request for defined monetary assistance without being represented by an attorney. Nonetheless, a claimant (or authorized representative, if applicable) may hire an attorney for this purpose; it will be entirely the claimant's or authorized representative's decision whether to do so. Under 18 U.S.C. 2259(d)(4), if the claimant or authorized representative is represented by counsel, the attorney shall not charge, receive, or collect, and the court may not approve, any payment of fees and costs that in the aggregate exceeds 15 percent of any defined monetary assistance paid under the Act on such claim. An attorney who violates this provision is subject to fine, imprisonment of up to one year, or both.

#### *E. Privacy*

Claimant submissions will not be made public and will be protected and used only in accordance with applicable law, including the Privacy Act of 1974, 5 U.S.C. 552a. Pursuant to 5 U.S.C. 552a, 18 U.S.C. 3509(d)(1), and 18 U.S.C. 3771(a)(8), the Department will not disclose to the public the names of the individuals who have requested defined monetary assistance from the Reserve or the names of the decedents for whom defined monetary assistance is sought from the Reserve, except as necessary to process a request or application or obtain a court order, to bring a criminal or civil case against an individual for obtaining defined monetary assistance by fraud, or pursuant to law or court order. However, the fact that a victim has received defined monetary assistance must be introduced in a Federal criminal proceeding where the amount of the victim's losses is at issue.

The process of providing a claimant with access to information held by the government will be subject to all applicable laws and regulations, including the Privacy Act of 1974, 5 U.S.C. 552a, and subpart B of part 16 of title 28, Code of Federal Regulations.

#### *F. Victim Choice as to Defined Monetary Assistance Versus Restitution*

Victims may choose to pursue restitution; to pursue defined monetary assistance; or to pursue some combination of the two, whether in the same case or in multiple cases, as appropriate. 18 U.S.C. 2259(d)(3) provides that a victim who has previously collected restitution

in an amount greater than the amount of the defined monetary assistance available under section 2259(d)(1)(D) is ineligible to seek defined monetary assistance. A victim who has collected restitution in an amount less than the amount of defined monetary assistance (i.e., less than \$35,000, adjusted for inflation as described above) is eligible to seek defined monetary assistance. Although the statute does not define the term “collected,” the word “collected” ordinarily means amounts actually received, not merely amounts ordered but not yet paid. *See, e.g., Collect*, Oxford English Dictionary, <https://www.oed.com/view/Entry/36263> (last visited Feb. 26, 2023) (defining “collect” to mean “to receive money”). There is often a lag between order and payment. The amount collected is the aggregated payment from all defendants. Once victims have collected an amount of restitution equal to the amount of defined monetary assistance, they become ineligible to obtain defined monetary assistance. For example, a defendant may have been ordered to pay a victim \$50,000 in restitution, but the victim to date might have received only \$5,000. That victim would remain eligible for defined monetary assistance until the \$35,000 (inflation-adjusted) collection threshold is reached. If a victim obtains orders for restitution, and then receives defined monetary assistance, the amount of the defined monetary assistance must be disclosed if the victim is later asked to provide information to a court pursuant to 18 U.S.C. 2259(b)(2)(C) concerning the amount of restitution collected. *See also* 18 U.S.C. 2259(d)(2)(C).

#### *G. One-Time Defined Monetary Assistance Payment; Effect on Restitution and Civil Remedies*

Under 18 U.S.C. 2259(d)(2)(A), a victim may receive a payment of defined monetary assistance only once. Even after receiving such a payment, a victim can, under 18 U.S.C. 2259(d)(2)(B), decide to seek restitution in court pursuant to 18 U.S.C. 2259. However, 18 U.S.C. 2259(d)(2)(C) specifies that the amount a victim received in defined monetary assistance must be deducted from the total amount of losses sought in restitution. For example, if a victim obtains defined monetary assistance in the amount of \$35,000, and in a later case pursues a

restitution claim for \$100,000, the maximum amount recoverable on the latter claim would be \$65,000.

Obtaining restitution or defined monetary assistance does not bar victims from seeking a civil remedy, such as under 18 U.S.C. 2255, although either may impact the amount the victims recover in a civil suit.

#### *H. Statutory Requirements for Eligibility*

Defined monetary assistance is available to “any victim of . . . trafficking in child pornography.” 18 U.S.C. 2259(d)(1)(A). The Act imposes three requirements for payment of defined monetary assistance.

First, the claimant must appear in child pornography that has been trafficked. “Trafficking in child pornography” is defined in 18 U.S.C. 2259(c)(3) by reference to statutes that prohibit advertising, transporting, distributing, receiving, or possessing child pornography, or accessing child pornography with intent to view it.

Second, at least one defendant must have been convicted in Federal court of conduct (advertising, transporting, distributing, receiving, or possessing child pornography, or accessing child pornography with intent to view it) involving a visual depiction of the claimant. The Act imposes no time limits on when the conviction must have occurred. Any qualifying conviction serves as a basis for establishing a claimant’s eligibility for defined monetary assistance, so long as there is sufficient evidence to obtain a court order as required under the statute.

Sometimes the evidence may suggest that the defendant possessed child pornography depicting a particular victim, but the defendant’s conviction was for a different crime. This could happen if child pornography involving Victim A was found on a defendant’s computer, but the defendant was actually convicted of producing child pornography of Victim B or distributing child pornography depicting Victim C. Victim A would not be entitled to defined monetary assistance based upon that case, though Victim A might be eligible in a different case.

A single conviction is sufficient to establish a claimant's eligibility. There is no need under the Act to prove that the claimant was a victim in more than one conviction for trafficking in child pornography.

Third, the claimant must appear in a visual depiction that shows "sexually explicit conduct" as defined in 18 U.S.C. 2256(2)(A) and must have been under the age of 18 at the time the visual depiction was created.

Not all images of children being traded online meet this definition of sexually explicit conduct. As one example, some individuals may appear in imagery that is illegal under State law, but that is not prohibited under Federal law. Because such images do not depict "sexually explicit conduct" as defined in section 2256, individuals appearing in such material would not be eligible for defined monetary assistance. In order to obtain defined monetary assistance, the claimant would need to establish that a defendant was convicted of a Federal offense involving the sexually explicit imagery.

A claimant need not be a United States citizen and need not reside in the United States in order to be eligible for defined monetary assistance.

#### *I. Section-by-Section Overview of Proposed Rule*

Section 81.51 sets forth the statutory basis for and the purpose of the Reserve, as well as the statutory one-time payment amount.

Section 81.52 provides the definitions applicable to this subpart. If a term is not defined in § 81.52, the term would have the statutory definition at 18 U.S.C. 2256, 2259, 2259A, or 2259B.

Section 81.53 provides certain requirements for eligibility for a payment from the Reserve, including burden of proof and eligibility exclusions.

Section 81.54 provides a description for how persons may submit requests to the Department for funds from the Reserve using an online portal located on the Department's

website for this program. Additional information as to how to submit a request to the Department will be available on the website.

Section 81.55 explains that the claimant must follow the directions on the Department's website for this program to submit a request to the Department for monetary assistance. Failure to submit all required documentation would potentially result in delay of the adjudication or return of the request by the Department.

Section 81.56 details the procedures to determine a personal representative to request and receive funds on the claimant's behalf.

Section 81.57 provides the process by which requests submitted to the Department for defined monetary assistance and court orders requiring payment will be processed by the Department.

Section 81.58 sets forth signatures and certifications required for a request to the Department to be considered complete.

Section 81.59 provides information related to privacy and confidentiality of claimants' names during the course of the request process.

## **V. Regulatory Analyses**

### *A. Administrative Procedure Act*

This proposed rule concerns matters relating to "benefits," 5 U.S.C. 553(a)(2), and also to "rules of . . . agency procedure," 5 U.S.C. 553(b)(A). Therefore, it is exempt from the requirement of prior notice and comment and from a delay in its effective date. Nevertheless, the Department believes that comments from the public may be useful in developing these proposed regulatory changes. Consequently, it is publishing this rule as a notice of proposed rulemaking and is soliciting public comments on this proposal.

### *B. Executive Orders 12866 and 13563*

This proposed rule has been drafted and reviewed in accordance with Executive Orders 12866 and 13563. This proposed rule is not a "significant regulatory action" under section 3(f)



of Executive Order 12866. The rulemaking is primarily procedural, dealing with the administrative process of submitting requests to the Department for defined monetary assistance. The key eligibility standards are set forth in the statute, and the Department is not by this proposed rule making any changes to those standards.

As set forth in the cost-benefit analysis below, this proposed rule will not have the economic effects described in section 3(f) of Executive Order 12866. It will not create any inconsistency or interference with an action taken or planned by another agency because the statutory authorization for this program directs the Attorney General (and, thus, the Department, and not any other agency) to administer the program. It does not affect entitlements, grants, user fees, or loan programs, nor does it raise novel legal or policy issues because the proposed rule is primarily procedural, describing the Department's implementation of the statutory eligibility criteria.

This regulation has no cost to State, local, or Tribal governments, or to the private sector. The Child Pornography Victims Reserve is funded by assessments paid by certain Federal offenders, as well as gifts, bequests, or donations from private individuals, deposited into the Crime Victims Fund in the United States Treasury and set aside in the Reserve; those funds may not be obligated in an amount above \$10 million in any given year. *See* 18 U.S.C. 2259B(a); 34 U.S.C. 20101(d)(6).

The cost to the Federal Government consists both of administrative expenses and amounts reimbursed to victims. Both types of costs depend on the number of claimants, including both prospective and retroactive claimants.

Although spending is anticipated to be higher in the initial years as a result of the number of potential retroactive claimants, the program will not spend more than the statutory maximum of \$10 million each fiscal year. That is, even if claimants submit requests for defined monetary assistance that, in the aggregate, exceed \$10 million in one year, the Department will spend no more than \$10 million, and will pay only those claims that can be satisfied from that amount. In

such a circumstance, claims will be paid based on the date on which courts ordered the payments, with the earliest-ordered payments made first. *See* 18 U.S.C. 2259B(b). Once the Department has paid out the allotted \$10 million dollars in any given fiscal year, the requests that remain unpaid will roll over into the next fiscal year and will be processed in the original order in which they were ordered. The Department will also follow the same order-of-payment procedure in any other situation in which the Reserve has insufficient funds to make all of the payments ordered under section 2259(d).

The Department has assessed the benefits and costs anticipated from this rulemaking and has considered whether there are reasonably feasible alternatives to this rulemaking, including whether there are reasonably viable non-regulatory actions that could be taken in lieu of this rulemaking. The purpose of this rulemaking is to provide the legal and administrative framework for defined monetary assistance to be given to any individual (or an authorized representative of such individual) who is determined by a Federal court to be a victim of trafficking in child pornography as defined by 18 U.S.C. 2259(c) and (d). The Department concludes that there are no viable non-regulatory actions that it could take to implement the AVAA Act in a fair and efficient manner.

#### *C. Executive Order 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, the Department has determined that this regulation does not have sufficient federalism implications to warrant the preparation of a federalism impact statement.

#### *D. Regulatory Flexibility Act*

The Department certifies that this proposed rule will not have a significant economic impact upon a substantial number of small entities. This regulation pertains to defined monetary assistance for eligible individuals who are depicted in child pornography that is the basis for

certain convictions under 18 U.S.C. chapter 110. The Reserve will provide payment to such child pornography victims based on orders obtained in U.S. district courts.

*E. Unfunded Mandates Reform Act of 1995*

This regulation will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year (adjusted annually for inflation), and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*F. Congressional Review Act*

This proposed regulation will not constitute a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*G. Paperwork Reduction Act of 1995*

This proposed rule implements 18 U.S.C. 2259, 2259A, 2259B, and 34 U.S.C. 20101(d), which establish the Reserve and define eligibility for payments from the Reserve. In order to evaluate requests and provide defined monetary assistance, the Department must collect certain information from individuals who are depicted in child pornography that is the basis for certain convictions under 18 U.S.C. chapter 110, or from their authorized representatives. Accordingly, the Department's Executive Office for United States Attorneys will submit an information collection request upon publication of the final rule to the Office of Management and Budget for review and clearance in accordance with the procedures of the Paperwork Reduction Act of 1995.

*H. Privacy Act of 1974*

The Department's Office of Justice Programs will publish a notice of a new Privacy Act system of records upon publication of the final rule, which will become effective upon publication, subject to a 30-day comment period for the routine uses claimed in the notice. In the interim, disclosures necessary to process requests will be made only with the prior written consent of claimants or as otherwise authorized under 5 U.S.C. 552a(b).

### *I. Severability*

It is the Department's intent that if any provision of this proposed rule is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, the remainder of the provision or rule shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable from this part and shall not affect the remainder thereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

### **List of Subjects in 28 CFR Part 81**

Child abuse, child pornography, victims, restitution, benefits.

By the authority vested in the Attorney General under 5 U.S.C. 301 and 28 U.S.C. 509, 510, 28 CFR part 81 is proposed to be amended as follows:

### **PART 81—CHILD ABUSE AND CHILD PORNOGRAPHY REPORTING**

### **DESIGNATIONS AND PROCEDURES, AND CHILD PORNOGRAPHY VICTIMS**

### **RESERVE**

1. The authority citation is revised to read as follows:

**Authority:** 18 U.S.C. 2259, 2259A, 2259B; 28 U.S.C. 509, 510; 34 U.S.C. 20101(d), 20341.

2. Revise the heading for part 81 to read as set forth above.

### **§§ 81.14 through 81.50 [Reserved]**

3. Amend subpart B by adding and reserving §§ 81.14 through 81.50.
4. Amend part 81 by adding subpart C to read as follows:

## **Subpart C—Child Pornography Victims Reserve**

Sec.

81.51 Child Pornography Victims Reserve.

81.52 Definitions.

81.53 Eligibility.

81.54 Submission of requests to the Department.

81.55 Supporting information.

81.56 Procedures for determining the personal representatives of an estate.

81.57 Request and order processing.

81.58 Signatures and certifications.

81.59 Privacy.

### **§ 81.51 Child Pornography Victims Reserve.**

The Child Pornography Victims Reserve (“Reserve”) was established on December 7, 2018, to provide a source of defined monetary assistance for eligible victims of trafficking in child pornography, pursuant to 18 U.S.C. 2259(d). Pursuant to the Department of Justice’s (“the Department’s”) authority to administer the Reserve, the Department will—

(a) Accept a request that the Department seek a court order for a determination of eligibility for defined monetary assistance from a claimant who chooses to proceed through the Department;

(b) Process such request and use reasonable efforts to follow up with such claimant to obtain information sufficient for a court to determine the claimant’s eligibility for defined monetary assistance;

(c) Upon confirming that the request to the Department is complete and not duplicative of a previously received request, use reasonable efforts to identify a Federal child pornography trafficking case in which an image of the identified victim appears and in which the Department may present an application for court determination of the claimant’s eligibility; and

(d) Pay a claimant pursuant to a Federal court order determining that such claimant is eligible to receive defined monetary assistance.

#### **§ 81.52 Definitions.**

(a) If a term is not defined in this section, the statutory definition at 18 U.S.C. 2256, 2259, 2259A, or 2259B applies to the submission and processing of requests to the Department.

(b) *Authorized representative* means an attorney or legal guardian (for claimants under age 18, incompetent, or incapacitated) of a claimant, the personal representative of a deceased claimant's estate, any other person appointed as a representative of a claimant by a Federal court pursuant to 18 U.S.C. 2259(c)(4), or a personal representative designated by the claimant to act on the claimant's behalf.

(c) *Claimant* means the person who claims to be a victim of trafficking in child pornography and to be eligible for the defined monetary assistance at 18 U.S.C. 2259(d).

(d) *Reserve* means the Child Pornography Victims Reserve set forth in 34 U.S.C. 20101(d)(6).

(e) *Victim or victim of trafficking in child pornography* means a person whom a Federal court has determined, under 18 U.S.C. 2259(d)(1)(B), to be a victim of trafficking in child pornography.

#### **§ 81.53 Eligibility.**

(a) *Presentment of claims for payment to Federal courts.* If a claimant chooses to submit a request to the Department, the Department shall review a properly submitted request and, as necessary, will ask the claimant for additional information to support the request. Once the Department confirms the request is complete and not duplicative of a previously received request, the Department will use reasonable efforts to find an appropriate case in which to present the claim by means of an application for an order of payment of defined monetary assistance in a Federal court. If the Department is unable to locate an appropriate case, it will notify the claimant and may decline to present the claim. If the Department presents the

claimant's application to a court, the Department may include a recommendation as to whether the court should grant or deny the application.

(b) *Determination by a court.* A Federal court will make the determination, under 18 U.S.C. 2259(d)(1)(B), as to whether a claimant is entitled to defined monetary assistance from the Reserve and, if so, shall order payment in the amount specified in 18 U.S.C. 2259(d)(1)(D). This amount is \$35,000 as adjusted for inflation from December 7, 2018, based on the date of the court's order.

(c) *Payment.* The Department shall pay to the victim (or the victim's authorized representative, as applicable) from the Reserve the defined monetary assistance set forth in 18 U.S.C. 2259, in accordance with the applicable Federal court order and consistent with 18 U.S.C. 2259B(b).

(d) *Exclusions.* (1) A victim may obtain defined monetary assistance under 18 U.S.C. 2259(d) only once. *See* 18 U.S.C. 2259(d)(2)(A).

(2) In no event shall an individual who is convicted of an act described in chapter 110 of Title 18, with respect to the victim, receive any defined monetary assistance from the Reserve on behalf of the victim. *See* 18 U.S.C. 2259(c)(4).

(3) Claimants who have collected restitution payments in excess of \$35,000 (as adjusted for inflation from December 7, 2018) pursuant to 18 U.S.C. 2259 are not eligible to receive defined monetary assistance under this program. *See* 18 U.S.C. 2259(d)(3).

#### **§ 81.54 Submission of requests to the Department.**

(a) Requests submitted to the Department must be submitted in the form and manner, and supported by documentation, specified from time to time by the Department. The Department's website will contain directions on how to access the claims system for defined monetary assistance.

(b) Requests may be submitted to the Department at any time. The Department may decline to present to a court any application based on a request that duplicates a previously

received request. A request duplicates a previously received request if it is submitted by or in connection with the same claimant and is premised on the same conduct as the previously received request. If a claimant obtains new information relevant to a claim after submitting a request, the claimant should amend that request rather than submitting a new request.

(c) If a claimant is represented by an authorized representative, the request to the Department and any supporting information may be submitted to the Department by that authorized representative. The authorized representative must submit a separate request on behalf of each represented claimant.

#### **§ 81.55 Supporting information.**

(a) As part of a request to the Department, the claimant should submit information as instructed by the Department. Failure to submit all required information may result in delay or a decision by the Department not to present the claimant's application to a court.

(b) All information supporting the request should be updated as necessary while the request to the Department is pending, including the amounts of any restitution collected, address changes, changes to information needed to process payment to the claimant, and any other pertinent information that may be relevant to the request.

(c) To avoid a potential violation of Federal law, claimants (or authorized representatives, if applicable) should not send images of child pornography when providing supporting information.

#### **§ 81.56 Procedures for determining the personal representative of an estate.**

(a) *In general.* For any request to the Department by the estate of a deceased claimant, the personal representative of the estate, who will be the authorized representative for purposes of defined monetary assistance from the Reserve, shall be determined as follows:

(1) First preference will be given to an individual appointed by a court of competent jurisdiction as the personal representative of the decedent or as the executor or administrator of the deceased claimant's will or estate.



(2) In the event that no personal representative or executor or administrator has been appointed by any court of competent jurisdiction, and such issue is not the subject of pending litigation or other dispute, the next preferred personal representative for purposes of defined monetary assistance from the Reserve will be the person named by the deceased claimant in the claimant's will as the executor or administrator of the deceased claimant's estate.

(3) In the event that no will exists, the next preference for personal representative for purposes of defined monetary assistance from the Reserve will be the first person in the line of succession for inheritance established by the laws of the deceased claimant's domicile governing intestacy. In the case where state law provides for two or more persons to inherit in equal shares (e.g., parents or siblings), the defined monetary assistance payment will be split accordingly.

(4) In the event that none of the individuals described in paragraphs (a)(1) through (3) of this section is available to serve as personal representative, any other person may seek to be appointed by a court of competent jurisdiction as the personal representative for purposes of defined monetary assistance from the Reserve. Upon appointment, that person will serve as personal representative.

(b) *Notice to beneficiaries.* (1) Any purported personal representative must, before submitting a request to the Department, provide written notice of the intent to submit a request and the procedures in paragraph (c) of this section to object to such status as personal representative to the immediate family of the decedent; to the executor, administrator, and beneficiaries of the decedent's will; and to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent.

(2) Personal delivery or transmission by certified mail, return receipt requested, shall be deemed sufficient notice under this subpart. The purported personal representative must certify that such notice (or other notice that the Department deems appropriate) has been given.

(c) *Objections to personal representatives.* Objections to the authority of an individual to file as the personal representative of a decedent may be submitted to the Department, as instructed on the Department's website for this program, by parties who assert a financial interest in the award. Any such objection must be submitted within 30 days following receipt of notice by the personal representative as defined under this section. If timely submitted, such objections shall be treated as evidence of a "dispute" under paragraph (d) of this section.

(d) *Disputes as to the identity of the personal representative.* The Department will not, and shall not be required to, arbitrate, litigate, or otherwise resolve any dispute as to the identity of the personal representative. In the event of a dispute over the appropriate personal representative, the Department may suspend or return a request to the claimant without prejudice to its later resubmission and may withhold any payment until the dispute is resolved either by agreement of the disputing parties or by a court of competent jurisdiction. Alternatively, the disputing parties may agree in writing to the identity of a personal representative to act on their behalf, who may seek and accept defined monetary assistance from the Reserve while the disputing parties work to settle their dispute.

#### **§ 81.57 Request and order processing.**

(a) Upon receipt of a request to the Department, the Department will review it and may follow up with claimants (or authorized representatives) to resolve any gaps in the request's supporting information.

(b) The Department will then use reasonable efforts to identify a Federal criminal case involving the claimant to present the claimant's application (with supporting information, as appropriate) for a court to determine the claimant's eligibility to receive defined monetary assistance. If the Department is unable to locate such a case, it will notify the claimant. If the Department presents the claimant's application to a court, in its sole discretion, the Department may or may not present the claim with an accompanying recommendation that the court order payment or not.

(c) If a court issues an order requiring payment to any claimant, the Department will process payment of defined monetary assistance to the victim in accordance with the order in the amount specified therein, upon receipt of the order and the requisite information from the claimant following instructions on the Department's website for this program. Failure to submit all required information to the Department may result in delay of payment.

(d) If the court issues an order denying eligibility based on an application submitted by the Department, the Department will notify the claimant. The Department may decide to appeal a ruling by a district court denying the Department's motion to establish a claimant's eligibility for defined monetary assistance. The Department will make reasonable efforts to consult with the claimant (and the claimant's authorized representative, if applicable) on the issue of appeal.

#### **§ 81.58 Signatures and certifications.**

A request to the Department will be deemed submitted when it is submitted online at the Department's website for this program; or, as provided in accordance with § 81.54, consistent with the instructions on the request form. By submitting the request, the claimant (or, if submitted by an authorized representative, the authorized representative) acknowledges and certifies as to each of the following:

(a) *Veracity of request.* The claimant certifies, under oath, subject to penalty of perjury or in a manner that meets the requirements of 28 U.S.C. 1746, that the information provided in the request and any documents submitted in support of the request are true and accurate to the best of the claimant's knowledge, and the claimant agrees that any defined monetary assistance paid from the Reserve is expressly conditioned upon the truthfulness and accuracy of the information and documentation submitted in support of the request. Where a claimant is represented by an authorized representative, that representative must have authority to certify the request on behalf of the claimant.

(b) *Potential criminal penalties.* The claimant understands that false statements or claims made in connection with the request may result in fines, imprisonment, and any other

remedy available by law to the Federal Government, including fines and imprisonment as provided in 18 U.S.C. 1001 and treble damages and civil penalties under the False Claims Act, 31 U.S.C. 3729, *et seq.* Requests that appear to be potentially fraudulent or to contain false information will be forwarded to Federal, state, and local law enforcement authorities for possible investigation and prosecution.

(c) *Limitation on attorney fees.* If a claimant is represented by counsel, no attorney shall charge, receive, or collect any payment of fees and costs that in the aggregate exceeds 15 percent of any defined monetary assistance paid on such application. An attorney who violates this provision is subject to fine, imprisonment of up to one year, or both.

**§ 81.59 Privacy.**

The Department will not disclose to the public the names of the claimants (or their authorized representatives) who have requested defined monetary assistance from the Reserve under this program, except as necessary to process a request or application or pursuant to law or court order.

Dated: May 24, 2023.

**Merrick B. Garland,**

*Attorney General.*

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